No. 86-322

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners

v.

J. T. GIBBONS, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether or not district courts have any discretion under Fed. R. Civ. P. 54(d) to tax cost, such as expert witness fees, beyond the scope of those items listed in 28 U.S.C. §§ 1920 and 1821.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are petitioners Crawford Fitting Company, Fred A. Lennon, Capital Valve & Fitting Company, R. D. Jennings and Thomas A. Read & Company, Inc. and respondent J. T. Gibbons, Inc.

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OPINIONS BELOW

The memorandum opinion of the district court, reported at 102 F.R.D. 73 (E.D. La. 1984), is reprinted as Appendix C to the Petition for Writ of Certiorari filed herein. The May 17, 1985 opinion of a panel of the Court of Appeals for the Fifth Circuit, 760 F.2d 613 (5th Cir. 1985), is reprinted as Appendix B to the Petition for Writ of Certiorari. The June 2, 1986 *en banc* opinion of the Court of Appeals for the Fifth Circuit,

790 F.2d 1193 (5th Cir. 1986), is reprinted as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) in that a Petition for Writ of Certiorari, filed on August 29, 1986, within ninety days of the judgment appealed from, was granted by this Court by order dated December 1, 1986. Jurisdiction of the district court was based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

STATUTES INVOLVED

The statutes involved herein, 28 U.S.C. § 1920, 28 U.S.C. § 1821 and Rule 54(d) of the Federal Rules of Civil Procedure, are reprinted as Appendix E to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Plaintiff J. T. Gibbons, Inc., filed the original action in this case in federal district court, claiming that petitioners engaged in numerous violations of the federal antitrust laws, 15 U.S.C. §§ 1 and 2, including a group boycott, horizontal and vertical price fixing, market allocation, predatory pricing, monopolization, and attempt and conspiracy to monopolize. The trial court directed a verdict in favor of defendants on all of plaintiff's claims, and entered judgment dismissing the complaint at plaintiff's cost. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 565 F. Supp. 167 (E.D. La. 1981). The Fifth Circuit Court of Appeals affirmed the trial court's rulings in all respects. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 704 F.2d 787 (5th Cir. 1983).

Defendants filed a bill of costs with the Clerk of Court, who taxed the costs for audio-visual equipment and assistance, copies of depositions, and daily trial

transcripts. The Clerk declined to tax as costs expert witness fees incurred by defendants, and attorneys' fees and expenses incurred in connection with depositions taken by defendants in Scotland. After a *de novo* review, the district court awarded defendants those costs taxed by the Clerk, as well as a portion of defendants' expert witness fees, and attorneys' fees and expenses incurred in connection with the Scotland depositions. The court's award of expert witness fees as costs was based upon the exercise of its discretion under Rule 54(d) of the Federal Rules of Civil Procedure. App. C at 13a-45a.

On May 17, 1985, a panel of the Fifth Circuit generally sustained the district court's award of costs, except that it reversed the award of expert witness fees in excess of the ordinary per diem and travel allowance prescribed by 28 U.S.C. § 1821. App. B at 5a-12a. Subsequently, the Fifth Circuit *sua sponte* ordered a rehearing *en banc*, thereby vacating the panel opinion. On the same day, it granted a rehearing *en banc* in *International Woodworkers of America, AFL-CIO and its Local No. 5-376*, 752 F.2d 163 (5th Cir. 1985) (hereinafter "*IWA*"). The prevailing defendant in *IWA*, an employment discrimination suit, had requested expert witness fees as a litigation expense incidental to an award of attorneys' fees authorized by the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. The district court found that that statutory provision did not authorize such an award, and a panel of the Fifth Circuit had affirmed this ruling. 752 F.2d 163 (5th Cir. 1985).

On June 2, 1986, in a majority opinion authored by Judge Carolyn Dineen Randall, the *en banc* court in the *IWA* case, adopting by analogy the rule with respect to awards of attorneys' fees set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), held that expert witness fees in excess of the

per diem and travel allowance sepcified in 28 U.S.C. § 1821 for ordinary witnesses are not generally taxable as costs. App. D at 46a-82a.

On the same date, the Fifth Circuit applied its sweeping new rule to the instant case, reversing the district court's award of expert witness fees to the prevailing defendants in excess of the amount allowed by 28 U.S.C. § 1821. App. A at 1a-4a. It did so although costs in the instant suit were sought on a completely different basis from that in the *IWA* case. The *IWA* case involved a request by a prevailing defendant for an award of expert witness fees incidental to an award of attorneys fees under the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988. In the instant case, the prevailing defendants in an antitrust lawsuit invoked the trial court's general discretion under Fed. R. Civ. P. 54(d) to recover costs, including expert witness fees. The *en banc* panel applied the same rule to both cases without distinction.

On August 29, 1986, defendants herein filed a timely Petition for Writ of Certiorari. This Honorable Court granted defendants' Petition (together with a Petition for Writ of Certiorari filed by the prevailing defendant in *IWA*) on December 1, 1986, ordering further that the two cases be consolidated for hearing.

SUMMARY OF ARGUMENT

The trial court's taxation of a portion of the fees paid by defendants for its expert witnesses was well within the discretion afforded it under Rule 54(d) of the Federal Rules of Civil Procedure. Historically, courts in equity possessed discretion to award costs, including costs not specifically authorized by statute. Courts sitting at law, however, had power only to award costs specifically delineated by statute. With the merger of law and equity under the Federal Rules of Civil Procedure in 1938, federal courts were accorded in all actions the combined powers of both courts of equity and law. Thus, under Rule 54(d), federal district courts are invested with equitable discretion in the taxation of costs not specifically authorized by statute.

This Court has confirmed that Rule 54(d) invests federal district courts with discretion, albeit sparing, to award costs not specifically authorized by statute, and has established general guidelines for the exercise of such discretion in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). When requested to tax such costs against the losing party, this Court has admonished the trial courts to give careful scrutiny to such items and to exercise their discretion "sparingly." The ruling of the trial court below conformed strictly with this standard and constitutes a proper exercise of Rule 54(d) discretion.

The Fifth Circuit's reliance on *Henkel v. Chicago, St. Paul, Minnesota & Omaha Ry.*, 284 U.S. 444 (1932), which decision predates the Federal Rules of Civil Procedure, is misplaced. This Court's decision in *Henkel* stands only as a statement of the district court's power to award costs at law at a time when the practice of the district courts was bifurcated between law and equity. *Henkel* is not relevant to the issue of a district court's discretion under Rule 54(d), which incorporated the powers of the courts at law and in equity.

The decision of the Fifth Circuit below not only ignores the significance of applicable legal precedent, but also turns its back on strong policy considerations favoring retention of district court discretion in the taxation of costs. It is a well publicized fact that the caseload of the federal district courts has reached an all-time high. A litigant with a legally dubious claim has little to lose by pressing forward with it, and there are more attorneys than ever eager to urge him on. Under the standard contingency fee arrangement, this litigant's out-of-pocket

outlay is guaranteed to be minimal. And the American Rule ensures that he will not be responsible for his opponent's attorneys fees if he loses.

The problem is most acute in the area of complex commercial litigation, where jury confusion must be considered a given. In such cases, the defendant faces a no-win situation. Even if he is fully vindicated at trial, his victory is often hollow, given the fees and costs incurred in the process. The discretion afforded district courts under Rule 54(d) served as an important deterrent against the prosecution of totally meritless claims, and the stringent standard fashioned by this Court for its exercise adequately safeguards proper use of that discretion. The opinion of the Fifth Circuit below, robbing the district courts of even this narrow discretion, is an unwarranted incursion on the power of the district courts to do justice.

ARGUMENT

I. THE FEDERAL DISTRICT COURTS HAVE DISCRETION TO AWARD THE FEES OF EXPERT WITNESSES AS TAXABLE COSTS UNDER RULE 54(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The question presented by the instant case is whether the trial court below abused its discretion under Rule 54(d) of the Federal Rules of Civil Procedure by taxing as costs certain expert witness fees, in excess of the statutory allowances set forth in 28 U.S.C. §§ 1920 and 1821. Though relatively narrow on its face, this question implicates the proper interpretation of two federal statutes, and the precedent established by this Court. Furthermore, its resolution should take into account the enormous costs of modern complex litigation, and the appropriate allocation of such costs in individual cases.

Analysis of the trial court's decision and the circuit court's subsequent reversal must begin with the language of the relevant statutes. Federal Rule of Civil Procedure

54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law." 28 U.S.C. § 1920 reads as follows:

> A judge or clerk of any court of the United States *may* tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) *Fees and disbursements for printing and witnesses;*
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment decree.
>
> Emphasis added.

"Fees . . . for . . . witnesses," 28 U.S.C. § 1920(3), include the minimal statutory per diem and travel allowance contained in 28 U.S.C. § 1821. App. E at 83a-85a.

Interpreting these statutes, the *en banc* panel of the Fifth Circuit below held that 28 U.S.C. §§ 1920 and 1821 provide the *exclusive* source of power for the district court to award expert witness fees, except when one of three narrow equitable exceptions applies. App. D at 50a. Petitioners respectfully submit that the *en banc*

panel erred. The district court's allowance of certain expert witness fees as costs constituted an appropriate exercise of the discretion afforded it under Rule 54(d) and this Court's standard for the exercise of that discretion, as set forth in *Farmer v. Arabian Oil Co.*, 379 U.S. 227 (1964).

A. The Adoption Of The Federal Rules Of Civil Procedure Effected A Merger Of Equity And Common Law Practice, And Confirmed The Discretionary Power Of Federal District Courts To Award Costs In All Cases

The power of the courts to tax costs historically depended on whether the court was sitting in law or equity. At early common law, the taxation of costs was unknown. Through a series of statutes, costs in actions at law became available in England. By contrast, courts of chancery always possessed a broad discretion in the allowance of costs, both in considering whether to award costs to a prevailing party at all and, if so, the types of costs to be awarded. 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* §§ 2665, 2668 (2d ed. 1983) (hereinafter "*Wright and Miller*"); 6 *Moore's Federal Practice*, ¶ 54.70[5] (2d ed. 1948) (hereinafter "*Moore's Federal Practice*"). This distinction was originally retained by the federal courts of the United States.

The power of the federal district courts to award costs was recognized by implication in the First Judiciary Act of September 24, 1789, Chap. 20, 1 Stat. at L. 73, U.S.C. title 28, § 141. At equity, federal district courts retained a broad discretion to grant reimbursement for costs not included in the ordinary taxable costs recognized by statute, as "part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Newton v. Consolidated Gas Co.*, 265 U.S. 78 (1924); *Ex Parte Peterson*, 253 U.S. 300 (1920).

By the Process Act of September 29, 1789, Chap. 21, 1 Stat. at L. 93, Congress provided that the "rate of fees . . . in the circuit and district courts, in suits at common law," should be the same as were "used" or "allowed" in state courts. It thus became the practical usage of the federal district courts at law to conform to state laws as to costs, when no express provision therefor had been made by Congress. The Fee Act of February 26, 1853, Chap. 80, Stat. at L. 161 (predecessor of 28 U.S.C. § 1920) set a uniform scale for certain costs in the federal courts. This Court held early on that the Fee Act of 1853 did not affect the equitable power of the federal courts to award expenses beyond the scope of that statute. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 at n.2 (1939).

The civil procedure in the district courts was thus divided into two practices: one for actions at law and another for suits in equity. Each was governed in part by federal statutes, but generally the practice at law conformed to state practice by virtue of the Conformity Act of 1872, and federal practice in equity was governed by the Equity Rules of 1912. In 1934, Congress enacted the Rule-Making Act, 28 U.S.C. § 723, which repealed the Conformity Act and returned to this Court its rule-making power.[1] 28 U.S.C. § 723(b); 2 *Moore's Federal Practice* ¶ 1.02a (2d ed. 1948). Congress further provided that the Court could at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. 28 U.S.C. § 723(c).

The Court chose to act on this authorization and, in the Federal Rules of Civil Procedure, effective September 16, 1938, it promulgated a unified system of rules for

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[1] This statute is now incorporated into 28 U.S.C. § 2072 which provides that the "Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions."

cases in equity and actions at law. *See* Fed. R. Civ. P. 2. Under the present single form of action, "all relief, formerly legal and equitable, to which a proponent of a cause of action is entitled is obtained in the single civil action." 2 *Moore's Federal Practice* § 2.06. Rule 54(d) of the Federal Rules of Civil Procedure now defines the power of a federal court to tax costs—a power which incorporates previous federal court powers both at law and equity. *Wright & Miller* § 2665.

B. This Court Has Confirmed The Discretionary Power Of The Federal District Courts Under Rule 54(d), And Established Standards For The Exercise Of That Discretion

Since the adoption of Rule 54(d), this Court has considered the scope of the district courts' power to tax costs under Rule 54(d) in only one case: *Farmer v. American Oil Co.*, 379 U.S. 227 (1964). As Judge Rubin observed in his dissent to the holding of the appellate court below, "the majority failed to consider fully the significance of that decision." App. D at 76a. As for Respondent Gibbons, its Brief in Opposition to the Petition for Writ of Certiorari fails to mention *Farmer* entirely. It is respectfully submitted that the legal and policy issues involved herein are identical to those considered by this Court in *Farmer*, and that the holding in that case controls the disposition of this one.

The trial court in *Farmer* refused to tax as costs expenses for witness travel from Arabia and for overnight transcripts. The trial court so ruled as an exercise of judicial discretion, expressly declining to rely upon the 100-mile limitation federal courts had traditionally imposed upon their power to assess transportation costs of witnesses brought from without the judicial district.[2]

[2] Under Rule 45 of the Federal Rules of Civil Procedure, a district court's power to compel attendance extends only 100 miles. Relying on this rule, district courts had traditionally declined to tax as costs the travel expenses of witnesses from beyond 100 miles.

The prevailing defendant appealed from the ruling denying the costs sought to be taxed. Before the Second Circuit Court of Appeals, plaintiff argued that the 100-mile rule completely barred the district court from taxing against him costs incurred by defendants in bringing witnesses from Arabia to this country. Commenting that the case "present[ed] a question of importance in the administration of civil litigation", 324 F.2d 359, 361, the appellate court, in a 5-4 decision, held that the 100-mile rule was inapplicable as a restraint upon the exercise of judicial discretion in the assessment of costs for witnesses brought to trial.

The appellate court fully considered the policy implications of its holding, finding that:

> [T]he 100-mile rule [cannot] be defended as an allocation of the expenses of litigation in keeping with the practice of our courts to let such expenses fall on the party who incurs them. Fees for legal services are usually the largest single expense of litigation. In most cases, the prevailing party must pay such fees himself, even if he has come into court only to defend against an unjust accusation. There is no reason to extend this practice further.
>
> . . . .
>
> It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection from the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which

the losing party, in the interests of justice, should bear such costs . . . . Indeed, adherence to a rigid limitation . . . is more likely to work to the detriment of litigants with meagre financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case.

. . . .

We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in good faith.

324 F.2d 359 at 363.

Compare 324 F.2d 359 at 365 (J. Smith, dissenting) ("This decision . . . abandons the traditional scheme of costs in American courts to turn in the direction of the English practice in making the unsuccessful litigant pay his opponent's litigation expense as well as his own.")

On writ of certiorari to this Honorable Court, the appellate court's ruling was affirmed. The Court dealt first with petitioner's contention that the district court was "wholly without power to tax costs against him for expenses incurred in bringing witnesses in from Arabia". Writing for the majority, Justice Black flatly disagreed, stating that:

> [I]t is sufficient here to point to Federal Rule of Civil Procedure 54(d), which provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party

> unless the court otherwise directs. . . ." *While this Rule could be far more definite as to what "costs shall be allowed," it quite clearly vests some power in the court to allow some "costs." We therefore hold that the district judge was correct in treating this case as an appeal to his discretion.*
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> 379 U.S. at 235, emphasis added.

Secondly, the Court found that the trial judge's refusal to tax the costs of foreign travel was an appropriate exercise of his discretion, observing in this respect as follows:

> We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigants costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. *Therefore, the discretion given district judges to tax costs should be sparingly exercised with references to expenses not specifically allowed by statute.*
>
> *Id.*, emphasis added.

As Judge Rubin concisely comments in his dissent below, the "Court's conclusion reveals its premise: Rule 54(d) gives the district court discretion [albeit sparing] to award costs not enumerated in § 1920." App. D at 77a.

In a separate opinion concurring only with the majority's result, Justice Goldberg disagreed "that the 100-mile rule is a matter for even the narrow discretion which the Court would allow the lower federal courts to exercise." 379 U.S. at 255. He reasoned that the 100-

mile rule, a standard created by jurisprudence and applied by "the overwhelming weight of authority," constituted a *de facto* rule of court within the meaning of the exception to Rule 54(d), providing that "except when express provision therefor is made either in a statute of the United States or in these rules", district courts have discretion to award costs to a prevailing party. 379 U.S. at 256. Moreover, Justice Goldberg decried the policy implications of the majority opinion, expressly endorsing and quoting the dissenting opinions of the appellate court below concerning allocation of costs in the United States.

Writing in dissent, Justice Harlan, joined by Justice Stewart, stated that "the foundation of today's decision" was the "scope of the discretion of a district judge acting within his powers." 379 U.S. at 240. It was their position that the only issue which should properly have been before the Court was the power of the district judge to tax travelling expenses beyond 100 miles.

Following the majority's decision in *Farmer*, several circuit courts have held that Rule 54(d) affords the federal district courts discretion to award expert witness fees beyond those specified by 28 U.S.C. §§ 1920 and 1821.

In *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982), *rev'd on rehearing on other grounds*, 727 F.2d 692 (8th Cir. 1984), the Eighth Circuit Court of Appeals held that the language from *Farmer* quoted above "authorizes district judges to award costs not specifically enumerated in 21 U.S.C. § 1821." 695 F.2d at 338. That court has approved the discretionary taxation of expert witness fees as costs upon a trial court finding that such expert testimony is "crucial" or "indispensable" to the determination of the case. *Id.* at 399. Like the instant case, *Paschall* was a complex anti-

trust lawsuit. The court in *Paschall* found that the expert testimony concerning competitive impact was "the most important issue" in the case, and affirmed an award of expert witness fees as costs. *Id.*

The Third Circuit Court of Appeals, in *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981), after quoting the language from *Farmer* relied upon by the Eighth Circuit in *Paschall*, reached the same conclusion:

> *Farmer* appears to hold that Rule 54(d) authorizes district judges to exercise discretion—albeit "sparing"—to award costs not specifically enumerated in § 1821. The Court seems concerned to avoid taxation of unnecessary and possibly vexatious costs accumulated by a prevailing party. Hence the reference to a national policy in favor of restrained award of costs. It is important to note that the Court based its interpretation of Rule 54(d) not on a *Henkel*-type theory of statutory preclusion of costs not listed in § 1821, but on policy considerations militating against award of unenumerated costs. A district court should therefore carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate only those expenditures necessary to the litigation. While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to ensure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures. We therefore agree with the District of Minnesota and the Eighth Circuit that *Farmer* affords a district court equitable discretion to award expert witness fees when the expert's testimony is indispensable to determination of the case.
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> 651 F.2d at 206.

Other circuit courts have endorsed rules permitting the discretionary award of expert witness fees as costs in certain circumstances. In his dissenting opinion below,

Judge Rubin summarized the positions of these courts as follows:

> The *FIRST CIRCUIT* has permitted the discretionary award of expert witness fees for courtroom testimony, noting that an express finding that the testimony was indispensable is usually required, but that prior court approval will suffice.
>
> . . . .
>
> The *SIXTH CIRCUIT* has affirmed an award of expert witness fees in a civil rights case, rejecting the argument that such fees were expenses incidental to [42 U.S.C.] § 1988 attorney's fees, and awarding them instead "pursuant to the court's sound discretion under", § 1920 and Rule 54(d). The district court had reduced the amount allowed to one-half the amount claimed because the expense had been incurred without prior approval of the court and was excessive.
>
> . . . .
>
> The *NINTH CIRCUIT* permits the award of expert witness fees if the testimony is necessary to the case and the fees are reasonable. In *Thornberry v. Delta Airlines, Inc.*, it describes the court's authority to award these costs as limited to special circumstances. However, it interprets these circumstances broadly, considering "the reasonable needs of the party in the context of the litigation." While *Thornberry* was a civil rights case, to which § 1988 was applicable, the court relied only upon Rule 54(d).
>
> The *DISTRICT OF COLUMBIA* has found no authority for a court to award excess expert witness fees but qualified this rule by an exception "if the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the case."
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> App. D at 77a-80, citations omitted.

The thread of commonality running through all these decisions is that each of them recognized power of the district courts, under Rule 54(d), to award as costs expert witness fees beyond the amounts stipulated in 28 U.S.C. § 1821 for fees of ordinary witnesses.

II. THE TRIAL COURT BELOW ACTED WITHIN ITS DISCRETIONARY AUTHORITY IN AWARDING AS COSTS THE FEES OF TWO OF THE THREE EXPERT WITNESSES USED BY PETITIONERS AT TRIAL

Expressly relying upon *Farmer* and the opinions of the Third and Eighth Circuit Courts of Appeals, the trial court below carefully considered petitioner's request that it tax the costs of three expert witnesses who testified on their behalf, and exercised its narrow discretion to tax as costs the fees of two of the three experts. The trial judge in the instant case certainly was fully aware of the restrictive standard formulated by this Court in *Farmer*, having by coincidence also served as the district judge whose initial order taxing costs formed the basis of the appeal in that case.

In a very thorough opinion, which the panel of the appellate court below found to be "thoughtful and carefully considered" App. B at 10a, and which the appellate court dissent on hearing characterized as "a carefully reasoned exercise of its discretion", App. D at 82a, the trial court reviewed the testimony of each of the three expert witnesses used by defendants at trial. The fees paid to Dr. Thomas R. Saving in the amount of $37,255.70, and the fees paid to Dr. Philip Robers in the amount of $49,225.00, were taxed as costs upon a specific finding that the testimony of these two experts was crucial and indispensable to the determination of the case. However, the fees in the amount of $64,000.00 paid to Mr. James C. Boland, a certified public accountant, were disallowed in their entirety. Thus, more than 40% of

the total expert witness fees incurred by the defendants were disallowed by the trial court, in the exercise of its discretion. The court further made a specific finding that the charges of the experts whose fees were taxed to the plaintiff as costs were reasonable. App. C at 37a.

The court then went on to observe that it was:

> particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where defendants were forced to defend an extremely and burdensome, vexatious, and totally meritless array of antitrust claims.
>
> App. C at 36a.

In this connection, the court adverted to the fact that the defendants had been subjected to "abusive documentary discovery costing them very considerable expense and inconvenience, and that plaintiff had made scant use of this discovery." *Id.* at n. 22. The court went on to note that:

> Despite the jury verdict against defendants on the counterclaim, the uttter baselessness of plaintiff's antitrust claims and the existence of considerable evidence in the record indicating that plaintiff was using this litigation to obtain a Louisana distributorship, may well constitute "exceptional circumstances" so as to allow the awarding of costs for expert witness testimony under the standard adopted by the District of Columbia Circuit.[3]
>
> *Id.* at n. 22.[4]

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[3] *See Quy v. Air American, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981).

[4] Respondent claims the jury found it had prosecuted the lawsuit in good faith. Defendants submit that this overstates the case. The issue of good faith before the jury dealt with the narrow question of whether plaintiff made full disclosure to its attorneys of the fact that it had an alternate source of product from another distributor. The trial court, in denying defendants' motion for judgment notwithstanding the verdict, held there was evidence in the record to support the jury finding that plaintiff made full disclosure of the facts, if not to his originally retained lawyers, then to his subsequently retained attorneys. "The jury's answer . . . [thus] exculpate[d] . . . the plaintiff Gibbons, of any bad faith in their factual disclosures to their attorney." 565 F. Supp. at 187-88. In effect, the court simply held that acting with advice of counsel, after full disclosure to counsel, constitutes a complete defense to a malicious prosecution claim. That does not mean a "totally meritless" claim is necessarily prosecuted in "good faith," simply because a lawyer is willing to pursue it after full disclosure of the facts.

Finally, the court clearly took into account the financial resources of the plaintiff, remarking that:

> The defendants were subjected to massive discovery and gigantic litigation costs by this action. The costs allowed by this decision are small by comparison.
>
> . . . .
>
> This case involved multimillion dollar claims of corporations against one another for alleged damages occasioned by their business activities. None of the individuals involved were poor. On the contrary, the evidence indicated they were all highly successful intelligent businessmen. It would be inequitable to relieve plaintiff of the obligation to pay the minimum costs assessed in this case.
>
> App. C. at 43a.

Defendants respectfully submit that the trial court's careful assessment of all the foregoing relevant factors and its subsequent award of costs plainly evidence a faithful compliance with this Court's mandate in *Farmer*, and constituted an entirely proper exercise of its discretion under Rule 54(d).

III. THE FIFTH CIRCUIT'S RELIANCE UPON CASE LAW PREDATING ADOPTION OF THE FEDERAL RULES OF CIVIL PROCEDURE IS MISPLACED

With respect to the question presented here, the appellate court below did not examine the trial court's exer-

cise of discretionary authority under Rule 54(d). Instead, it simply held that the trial court had no discretion at all to award expert witness fees as costs in this case, and that the exclusive source of power to award fees of witnesses as costs is 28 U.S.C. §§ 1920 and 1821. Other circuit courts have reached similar conclusions. *See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 (7th Cir. 1986); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985).

The cornerstone of all of these decisions is a misplaced reliance upon the case of *Henkel v. Chicago, St. Paul, Minnesota & Omaha Ry.*, 284 U.S. 444 (1932). Decided in 1932, five years prior to the adoption of the Federal Rules of Civil Procedure, *Henkel* involved a claim under the Federal Employers' Liability Act to recover damages. After prevailing at trial, plaintiff petitioned the district court to include his expert witness fees as taxable costs pursuant to state statute. The district court declined his request and, on appeal, the Eighth Circuit certified to this Court the legal question of whether district courts may apply in cases at law a forum state statute authorizing the award of expert witness fees as costs. Interpreting the statutory predecessor of 28 U.S.C. § 1821, the Court answered this question in the negative. The Court found that in this statute, Congress had comprehensively legislated the costs awardable for witness fees. Accordingly, it concluded that Congress had preempted the field and that district courts were not free to apply state statutes.

Contrary to the holding of the Fifth Circuit in the case at bar, *Henkel* does not dispose of the question now before this Court. *Henkel* was decided before the adoption of the Federal Rules of Civil Procedure, which merged the federal practice in actions at law and equity. It was a case at law and, at that time, courts sitting in

law had no power to award costs not expressly granted by statute. In equity, courts have always retained the power to award costs not specified by statute. *Henkel* stands as a correct statement of the power of a district court in 1932 to tax costs not specifically authorized by statute in cases *at law*. It did not purport to address the separate issue of a district court's authority to award such costs as part of its historic equitable powers, because that issue was not even before the Court on the certified question decided therein. *Henkel* therefore has no bearing upon the issue now before this Court, which involves the *combined* legal and equitable powers of the federal courts, under Rule 54(d), addressed in the *Farmer* case.

The Fifth Circuit declined to regard *Farmer* as an affirmance of the discretionary power entrusted to the district courts by Rule 54(d). Characterizing the Court's clear and unequivocal language to that effect as mere "dicta" [App. D at 56a], the appellate court ruled that the trial court was without discretionary power to tax the expert witness fees at issue herein as costs. Other courts have also employed the "dictum" rubric to circumvent *Farmer*. *See Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 at 910 (7th Cir. 1986). This argument cannot survive a reading of even the very first paragraph of the *Farmer* opinion, which states that:

> The questions presented in this case relate to the power and discretion of a United States district court to tax as costs against the loser in a civil lawsuit expenses incurred by the winner in carrying on the litigation.
>
> 379 U.S. at 228.

As the concurrence and the dissent in *Farmer* made clear, it was the majority's decision to resolve the questions before the Court by affirming the district judge's exercise of his discretion pursuant to Rule 54(d) (when

other, more restrictive avenues were clearly open to it) which formed the focal point of the Court's discussion over the appropriate disposition of the case. It all this discussion were mere dicta, there would have been scant justification for writing the majority opinion, let alone the concurrence and the dissent.

But as other circuits have readily recognized, *Farmer's* treatment of the discretionary power Rule 54(d) affords to trial judges clearly is not dicta. Rather, it is an affirmation of the principle that, when law and equity were merged with the adoption of the Federal Rules of Civil Procedure, Rule 54(d) gave federal courts in all actions the discretion previously afforded only to federal courts exercising equity jurisdiction.

The majority below also relied on two other arguments to bolster its result. First, it found as a matter of statutory construction that 28 U.S.C. § 1920 falls within the exception to Rule 54(d), which provides on its face that the Rule is applicable "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules". The majority thus concluded that 28 U.S.C. § 1920 is the exclusive authority for the award of costs. As Judge Rubin correctly observed in his dissent:

> [s]ection 1920 does not on its face purport to be exclusive . . . Its phrasing is permissive because it was revised, after enactment of the Federal Rules, in recognition of the discretion Rule 54(d) affords.[5] It is not, therefore the kind of "express provision" that is an exception according to the terms of Rule 54(d).
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> App. D at 74a.

[5] 1943 United States Code Congressional Service 1887-88 (80th Cong., 2d Sess.). "Word 'may' was substituted for 'shall' before 'tax as costs,' in view of Rule 54(d) of the F.R.C.P."

Judge Rubin went on to note that the majority rule effectively reduces Rule 54(d) to the level of redundancy, and robs it of any independent force or meaning. *Id.*

Moreover, the majority's emasculation of the Rule's discretionary power is inconsistent with its recognition of three other discreet equitable exceptions to the exclusive operation of § 1920, which are totally without any statutory underpinning. *Id.* Blessing three narrow equitable exceptions to its rule while precluding all other relief does not comport with the most basic principals of rationality. It can only be characterized as arbitrariness—the very antithesis of equity. The majority acknowledges the district courts' equitable power to the extent it recognizes three equitable exceptions to its rule, but beyond these three circumstances arbitrarily cuts off that power. There is no rational basis for the sanction of this equitable power in three narrow circumstances, but in no others.

As final support for its result, the majority reasons that, "because Congress has expressly provided for the award of expert witness fees in some statutes, it must therefore have intended to exclude them in all other instances, and [finds] that the word costs refers only to those limited costs specified in § 1920." App. D at 65a. But the fact that Congress expressly mentioned expert witness fees in some statutes does not necessarily mean they are forbidden in the absence of explicit statutory authorization. All of the statutes cited by the majority and by respondent[6] to illustrate this point were enacted long after Rule 54(d). They therefore cannot be considered determinative of the intent of Congress when it promulgated Rule 54(d), and when it revised § 1920 in view of the discretion which Rule 54(d) afforded the district courts. Furthermore, courts have often taken steps in the exercise of their 54(d) discretion to achieve reasonable and fair results under § 1920. By way of

[6] Brief in Opp. at 6-7.

example, analogy may be drawn to cases in which fees of court-appointed expert witnesses were awarded, *before* 28 U.S.C. § 1920 was amended to add the compensation of a court-appointed expert as a taxable cost.[7]

IV. THE FLEXIBILITY RULE 54(d) AFFORDS IN EACH INDIVIDUAL CASE SERVES AS AN IMPORTANT DETERRENT AGAINST THE PROSECUTION OF TOTALLY MERITLESS CLAIMS

The enormous expense of modern complex litigation has been a matter of great concern to both the Bench and the Bar. Appropriate exercise of the discretionary power of trial courts to allocate costs under Rule 54(d) is a vital tool for balancing the competing interests of permitting free access to the courts while discouraging abuses of the judicial process. Certainly, litigants with meritorious claims should not be discouraged from pursuing their rights for fear of facing a high cost award if they lose. On the other hand, justice and the judicial system are not served when one who brings an entirely nonmeritorious lawsuit may do so with impunity—particularly where the prevailing party is forced to expend tremendous sums in defending against frivolous claims.

The antitrust lawsuit which gave rise to the instant controversy typifies the problem. As the trial court below observed in its opinion granting directed verdicts for Petitioners, the Respondent in this action asserted that Petitioners had committed virtually every offense proscribed by the Sherman Act, including group boycott, refusal to deal, horizontal and vertical price fixing, il-

[7] *See United States v. Articles . . . Provimi*, 425 F.Supp. 228, 231 (D.N.J. 1977) (show cause order proposing to assess each party one-half of the cost of the expert's services in conducting study, preparing report, and testifying); *United States v. R.J. Reynolds Tobacco Co.*, 4126 F.Supp. 313, 316 (D.N.J. 1976) (rejecting the government's argument that federal law precluded it from paying the fees and expenses of a court-appointed expert witness). Cf. *Frazier v. Allen Cast, et al.*, Slip Op. No. 80C 5280 (N.D. Ill., July 30, 1986).

legal data dissemination, horizontal and vertical allocation of territories, predatory pricing, and conspiracy and attempt to monopolize.

After hearing all of the testimony, the trial court granted directed verdicts on all counts for Petitioners and, in its opinion awarding costs to Petitioners, specifically described the panoply of charges brought by Respondent as "an extremely burdensome, vexatious, and totally meritless array of antitrust claims." App. C at 36a. The Fifth Circuit Court of Appeals affirmed the trial judge's directed verdict rulings in all respects, noting that this litigation had been brought basically as a refusal to deal case, even though it was undisputed that the Respondent always had access to the product involved.[8]

In deciding whether or not to press a claim such as the one brought against Petitioners herein, a business manager goes through the normal process of a cost/benefit analysis, weighing the potential risks against the potential returns. Traditionally, the potential risks have been virtually nonexistent. Under the typical contingency fee agreement, the plaintiff is only responsible for routine expenses, which comprise a very small part of the total expenditures involved in pursuing complex litigation. On the other hand, the potential rewards can be astronomical, especially in antitrust cases, where the actual damages awarded are automatically trebled. The incentives are therefore great to pursue even the most marginal of claims.

Although the law provides that the plaintiff bears the burden of proof on each element of its claims, every trial lawyer knows that the average jury assumes the full majesty of the law could not possibly be brought into play unless there is a strong likelihood that someone has

[8] The Fifth Circuit specifically observed that "[t]he *sine qua non* of the injury caused by a refusal to deal would be inability to obtain the product." 704 F.2d 787 at 792.

done something wrong. Moreover, in complex litigation such as antitrust cases, the defense lawyer cannot rely on the jury's instincts for what is right to yield the correct result, because virtually all of the testimony is likely to relate to matters that are entirely beyond the ken of the average juror. Thus, in a case which presents doubtful claims from a legal point of view, the plaintiff's lawyer must focus on getting the case to the jury for a decision (where he knows the marginal nature of the claim will not be at all apparent), and the defense lawyer must concentrate on presenting so complete a case that the judge will feel that it is his obligation to direct a verdict.

Often, extensive expert testimony is the only way for the defense to conclusively demonstrate that a directed verdict is appropriate as a matter of fact and law. For example, Respondent herein made bald allegations charging Petitioners with violations of § 1 and § 2 of the Sherman Act. Dr. Thomas Saving, an expert economist, was retained by Petitioners to analyze the relevant industry. Not only did he testify that the industry is extremely competitive, with very low entry barriers, but he also found that Petitioner Crawford Fitting Company "has a small segment in the industry and completely lacks market power." 565 F.Supp. 167 at 180. Dr. Philip Robers, a supply and transportation expert for Petitioners, was called to testify with respect to Respondent's claim that it had been boycotted. After conducting an exhaustive study of Respondent's purchase orders, invoices, shipping orders and other relevant documents, Dr. Robers reached the following conclusions: first, it was clear that Respondent had never in fact been boycotted because it always had access to as much of the product as it wanted through an alternate source; and second, the Respondent's own records demonstrated conclusively that this alternate source furnished the product at better prices, and with superior delivery times, than Respondent had received from Petitioner. 102 F.R.D. at 86-87.

In response, Respondent Gibbons has argued vehemently that in bringing suit it acted as a private attorney general, and that the assessment of costs against it would deter it and other potential private attorneys general from pursuing alleged antitrust violators. The district court answered this disingenuous plea in the following way:

> [First,] there must be some limits and some discipline applied even to law enforcement in this sense. The defendants were subjected to massive discovery and gigantic litigation costs by this action. The costs allowed by this decision are small by comparison.
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> . . .
>
> [Second,] . . . the plaintiff in this case was clearly interested in advancing its own financial interests. Far from advancing the public interest, there was considerable evidence in the record indicating that the Keeney's were using this litigation to obtain a Louisiana distributorship from Crawford Fitting Company.
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> [And third,] . . . the public interest is not served when a complex antitrust case containing all the abstruse verbiage known only to antitrust practitioners, and having no merit whatsoever, is thrust upon our overcrowded court dockets. This is a blatant disservice to the court system and to those litigants whose cases demand attention.
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> App. C at 43a.

Nonmeritorious cases of this kind are routinely pursued in our legal system because an objective cost/benefit analysis makes them attractive. The United States has the highest ratio of lawyers per capita of any nation in the world, so there is an abundance of attorneys willing to press dubious causes. The legality of contingency fee arrangements, which are forbidden in many other countries, effectively eliminates funding concerns. And finally, there is the "American Rule." No other legal system in the world requires the winner in

litigation to pay his own attorneys' fees. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792, 798 (1966). But historically that has been the rule in this country: a successful defendant is generally limited to recovering nothing more than routine court costs.

The impetus this blend gives to the filing of tenuous claims is readily apparent in the burgeoning field of complex business litigation. The statistics speak for themselves. In 1968 there were about 71,000 civil cases filed in the federal courts. By 1977, the number had risen to 130,000; by 1980 it was 180,000, and by 1984, the figure was 261,485. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1984). The latest statistics show that 278,793 civil cases were filed in 1985. FEDERAL JUDICIAL WORKLOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1985).

The discretionary power authorized by Rule 54(d) not only permits trial courts to fashion equitable results in individual cases, but it also serves as an important check against gross abuses by litigants and potential litigants. Under the rigid rule adopted by the Fifth Circuit below, the most marginal of lawsuits may be brought at very low risk. Reversal of the Fifth Circuit's holding, and affirmance of the discretionary power which the *Farmer* case held belonged to the trial courts, would have the salutary effect of giving the potential plaintiff with a dubious claim at least a moment's pause to consider the increased risks before leaping into an already congested litigation arena.

The experience in the circuits which have recognized trial court discretion to award expert witness fees under Rule 54(d) clearly shows that this discretionary authorization has been exercised with the greatest restraint. Indeed, Respondent's brief opposing the Petition for Certiorari in this case points out at some length that trial

courts have rarely exercised their authority to tax expert witness fees as costs. Resp.'s Brief in Opp. to Pet. at 10-11. Nothing to date has given any indication that taxation of such fees as costs would be done as a matter of course. The circuit courts which have approved Rule 54(d) discretionary authority, as well as the trial court below, have recognized that *Farmer* mandates a "tight-fisted" approach in assessing the propriety of taxing expert witness fees as costs, and that tight-fisted approach has been uniformly followed and applied.

As a matter of policy and practicality, however, the mere recognition of the trial court's discretionary power under Rule 54(d) on this issue affects the cost/benefit analysis of filing a truly marginal lawsuit in a way that can only promote care and responsibility. And that, in turn, can only promote the efficacy of the judicial system.

CONCLUSION

The decision of the appellate court below flies in the face of this Court's holding in *Farmer*. It is thus bad law. It is also bad policy, because its effect is to strip federal trial courts of their historical discretionary power over cost awards, at the very time when affirmance of such discretionary power is most needed. The appropriate application of this discretionary power at the trial level in the case at bar is a good illustration of the important policy considerations that are served by the *Farmer* standard.

Here Petitioners were put to an enormous expense defending against a "totally meritless" lawsuit. App. C at 36a. In a very thorough and cautious opinion, the trial court held that the testimony of two of the three expert witnesses whose fees were sought to be taxed was "crucial and indispensable." App. C at 38a. Exercising the discretion authorized by *Farmer* under Rule 54(d), the trial court thereupon determined that it would be equitable in this particular case to tax the fees of these two experts to the Respondent as costs.

By investing the trial courts with such discretion, Rule 54(d) provides a measure of flexibility to do justice in the individual case and, concomitantly, a vehicle to deter gross abuses of justice. These twin goals are rooted in the most basic concepts of equity. In *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), this Court, speaking through Justice Frankfurter, observed that:

> As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.
>
> 307 U.S. at 167.

Such individualization is exemplified by the opinion of the trial court below. By contrast, the appellate court's decision below rejects trial discretion, and enshrines the sterility cautioned against by Justice Frankfurter in *Sprague*.

Petitioners therefore urge this Honorable Court to reverse the holding of the Fifth Circuit Court of Appeals, and to reinstate the April 2, 1984 memorandum decision of the trial court below, App. C, in its entirety.

Respectfully submitted, this 15 day of January, 1987.

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